IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR

:: ORDER ::

S.B. CIVIL REVISION PETITION NO.1226/1999-PEERU SINGH VS. RAMDAYAL & ORS. AGAINST THE JUDGMENT AND DECREE DATED 5.10.1995 PASSED BY SH. MOHANLAL, RHJS, ADDL. DISTRICT JUDGE, BHILWARA IN CIVIL APPEAL NO.58/1995.

DATE OF ORDER : 5.4.2005.

PRESENT

HON'BLE MR. PRAKASH TATIA,J.

Mr.R.R.Nagori, for the petitioner.
Mr.J.K.Bhaiya, for the respondents.

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Heard learned counsel for the parties.

The petitioner is aggrieved against the order of the first appellate court dated 5th Oct., 1995 by which the petitioner's application filed under Section 5 of the Limitation Act has been dismissed by the first appellate court and consequently, the first appellate court dismissed the appeal of the petitioner.

According to learned counsel for the petitioner, the petitioner submitted an application under Section 5 of the Limitation Act disclosing the sufficient reason for not preferring

the appeal within the period of limitation. It is submitted that even if the facts as mentioned in the order of the first appellate court are accepted then admittedly, the petitioner's advocate did not appear in the trial court after the transfer of the civil original suit and his brief holder appeared before the trial court. Neither his advocate nor junior advocate informed the petitioner about the transfer of the case and because of that reason only, the petitioner could not appear before the court where the suit was transferred. It is also submitted that even assuming for the sake of argument, there was some negligence on the part of the petitioner in not preferring the appeal in time,the court should have looked into the facts to judge the conduct of the petitioner to find out whether the petitioner could have left the case in between when his immovable property was at stake? Even if the court would have looked into the entire proceedings taken in the trial court, the first appellate court could have reached to the conclusion that the petitioner would not have left the case uncontested because of the reason that the question of the title of the property was involved and plaintiff himself admitted in his plaint that he is not in possession of the property and he admitted that he mortgaged the property on earlier occasion and he admitted that he himself did not re-deem the property and he further admitted that the property was subjected to sell long before the filing of the present suit by the plaintiff. The first

appellate court could have looked into the fact that after the pleading all these facts, the plaintiff originally prayed for relief of prohibitory injunction and in view of the settled position of law, the suit itself was not maintainable for relief of injunction as the plaintiff was not in possession of the property as per his own admission. Even if, the order of amendment of the plaint, which though has attained the finality, the admissions made in the plaint has not been withdrawn by the plaintiff. Not only this, the plaintiff prayed only relief of possessing keeping the original pleadings about all the previous transactions as it is. All these facts clearly reveal that the petitioner would not have left the case during trial stage only and would not have taken the risk.

According to learned counsel for the petitioner, even if there is a case of negligence of the petitioner even then it will result into grave injustice in case the delay in filing the appeal will not be condoned and there should not be any punishment to the extent of deprivation of entire property because of the delay of only three months'.

I considered the submissions of learned counsel for the parties and perused the original record, which was summoned by the court.

It is true that the merits of the case cannot be judged and

decided while considering application under Section 5 of the Limitation Act and without condoning the delay, but at the same time, the interest of justice requires certain steps in peculiar facts and circumstances of each case and taking into account all the facts, this Court feels that if the court would have condoned the delay, no prejudice would have been caused to even plaintiff as he would have succeeded in his case if he has merit in his case, but after a lawful contest and not by default. This is not the principle to be applied in all the cases, but is applied because of the facts of this case and the special reason.

So far as facts are concerned, they are not in more dispute. It is no doubt that appeal was preferred by the petitioner was delayed by about three months and it is also true that there were allegations against the advocate, which prima facie may not be correct, but the question was of the delay of three months only and looking to the decree, which has been passed by the court declaring the plaintiff as owner of the property and decree for possession of the property , which was according to plaintiff himself was mortgaged by him to defendant no.2 Nahar Singh and said property was re-deemed not by the plaintiff, but by defendant no.3 Hemraj and he sold the property to defendant no.1 Peeru Singh and he was in possession of the property at the time of filing of the suit and he refused to deliver

the possession to the plaintiff and plaintiff admitted that by this, he has been deprived from his property. These are the facts pleaded by the plaintiff in the plaint itself. Therefore, there were triable issues and they are good questions of law about the maintainability of the suit itself, which should have been decided by the trial court before passing the decree declaring the plaintiff the owner of the property etc.

This Court would not have narrated all these facts if this Court would have not come across certain very material facts from the record itself. Therefore, a sufficient case is made out for interference by this Court by exercising powers under Section 115 CPC as the order passed by the first appellate court on application under Section 5 of the Limitation Act appears to be not only perverse, but appears to have been passed without considering the material on record as well as the record of the court itself and by ignoring the fact that courts are meant for advancing the cause of justice.

In view of the above, the revision petition of the petitioner is allowed and the order passed by the first appellate court rejecting the application under Section 5 of the Limitation Act is set aside. The delay in filing the appeal is condoned. The matter is remanded back to the first appellate court to decide

the appeal on merits. However, it is made clear that the plaintiff-non-petitioner shall have full opportunity to contest the appeal on all the grounds except ground of limitation before the first appellate court and any statement of fact recorded from the original file and any observation made by this Court cannot be treated to be any final decision on any of the issues involved in the suit or appeal and those facts have been taken note of only to find out whether the first appellate court has considered the entire relevant facts for the purpose of condoning the delay in filing the appeal and to assess the conduct of the petitioner.

(Prakash Tatia), J.

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